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IN THE UTAH COURT OF APPEALS

*Appeal from the Second District Court, Weber County
Judge Stanton M. Taylor*

ERIN JO CHAMBERS,)	
)	Appellate Court No. 940210-CA
Plaintiff/Appellee)	
)	Cross-Appeal No. 940222-CA
v.)	
)	Trial Court No. 890901927
THOMAS D. CHAMBERS,)	
)	Priority No. 15
Defendant/Appellant.)	

BRIEF OF APPELLANT

UTAH COURT OF

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FILED
Utah Court of Appeals

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Marilyn M. Branch
Clerk of the Court

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STATEMENT OF JURISDICTION

This is an appeal by Thomas D. Chambers ("Tom") and a cross-appeal by Erin Jo Chambers ("Erin") from portions of an order entered by the trial court following remand of this marital dissolution action in a prior appeal, Case No. 900631-CA. This Court has jurisdiction over the present appeal pursuant to Utah Code Ann. § 79-2a-3(2)(h) (Supp. 1990), which governs review of domestic relations matters.

STATEMENT OF THE ISSUES ON APPEAL

- ▶ *After the trial court acknowledged that it had erred by awarding alimony which exceeded Erin's living expense by \$108,000, did it err again by refusing to order that Tom be reimbursed for the overpayment?*
- ▶ *Did the trial court err by reversing its original order terminating spousal support after six years, based on assumptions about Erin's investment base and rate of return which were outside the evidence in the record?*
- ▶ *After finding on remand that Erin had the financial means to pay her own attorney, did the trial court err by ordering Tom to pay a substantial portion of Erin's attorneys' fees, anyway?*

STANDARDS OF REVIEW

While a trial court has broad discretion to set alimony and award attorneys' fees in marital dissolution actions, that discretion is not unlimited. Read v. Read, 594 P.2d 871, 872 (Utah 1979). It must be exercised "within the bounds and under the standards" set by the high courts of this state, and the decision

must be supported "with adequate findings and conclusions." Davis v. Davis, 749 P.2d 647, 649 (Utah 1988). In addition, the appellate court can disturb an award where serious inequity is manifest from the findings and conclusions. Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986).

Failure to apply the correct legal factors in analyzing the parties' circumstances constitutes an abuse of discretion. Naranjo v. Naranjo, 751 P.2d 1144, 1147 (Utah App. 1988). The factors governing the determination of alimony are the financial condition and needs of the receiving spouse; the ability of the receiving spouse to produce a sufficient income; and the ability of the responding spouse to provide support. See Schindler v. Schindler, 776 P.2d 84, 90 (Utah App. 1989). The factors governing the decision to award attorneys' fees and the amount of such fees are the reasonableness of the requested fees; the financial need of the receiving spouse; and the ability of the other spouse to pay. Bell v. Bell, 810 P.2d 489, 493 (Utah App. 1991) (citing Rasband v. Rasband, 752 P.2d 1331, 1337 (Utah App. 1988)).

There is another general standard which applies in the procedural context of this case. Where (as here) an action has been remanded for further proceedings consistent with the appellate court's opinion, the trial court must carefully heed the instructions contained in the mandate. Vinton Eppsco Inc. v. Showe Homes, Inc., 97 N.M. 225, 638 P.2d 1070, 1071 (N.M. 1981); In re Adoption of BBC, 849 P.2d 769, 722 (Wyo. 1993); Bryfogle v. Arizona Dep't of

Corrections, 153 Ariz. 598, 159 P.2d 617, 621 (App. 1967). Any deviation is reversible error.

In sum, a domestic relations order on remand will be reversed, if there is a misapplication or misunderstanding of the law, if the evidence clearly preponderates against a finding of fact, if there is a serious inequity which must be rectified, or if there is a departure from the appellate mandate. English v. English, 565 P.2d 409, 410 (Utah 1977).

STATEMENT OF THE CASE

This is an appeal from an Order on Remand and related Findings of Fact and Conclusions of Law dated March 2, 1994 which, among other things, denied Defendant/Appellant's Motion for Reconsideration/Rehearing of the Memorandum Decision dated July 12, 1993 and Supplemental Memorandum dated November 19, 1993. R.O.A. 921-932.¹ A copy of the Order on Remand is included in Appendix 1 to Appellant's Brief.

On November 30, 1990, the Honorable Stanton M. Taylor of the Second Judicial District Court of Weber County entered a Decree of Divorce, together with related Findings of Fact and Conclusions of

¹The following conventions are adopted for citations to the record:

"R.O.A." refers to the pertinent page of the Record on Appeal filed June 9, 1994.

"Tr." refers to the reporter's official transcripts of trial proceedings in the case below, by volume and page.

"Exh." refers to the numbered trial exhibits in the case below.

"Decree" refers to the Decree of Divorce entered November 30, 1990 by Hon. Stanton M. Taylor (R.O.A. 398-412).

"Findings of Fact" refers to the Findings of Fact and Conclusions of Law entered November 30, 1990 by Hon. Stanton M. Taylor (R.O.A. 378-397).

"Opinion" and "Op." refer to the Opinion filed by the Utah Court of Appeals on October 21, 1992, by page number.

"Hr." refers to the reporter's official transcripts of the hearing on remand on June 7, 1993, and hearing on Defendant's Motion for Reconsideration/Rehearing on February 28, 1994, by date and page.

"Order on Remand" refers to the Findings of Fact, Conclusions of Law and Order on Remand entered March 2, 1994 by Hon. Stanton M. Taylor (R.O.A. 921-932).

Law. R.O.A. 378-397, 398-412. Both parties appealed. R.O.A. 415, 426.

On October 21, 1992, this Court reversed and remanded certain rulings for further findings of fact, including the award of alimony to Erin and the partial reimbursement of attorneys' fees by Tom. Op. at 2-5.²

On remand, the trial court acknowledged that it had made some analytical errors. As pointed out by this Court, the trial court admitted that it had failed to consider Erin's employability and that it had improperly lumped the children's expenses into the computation of Erin's living expense need. See Op. at 3 & 4 n.1. Because of this miscalculation, the trial court determined that Erin had been awarded and had already received \$108,000 more than she was entitled to, but the trial court refused to order Erin to return these overpayments to Tom. R.O.A. 731-737, 766-767.

But that was just the beginning. Undertaking its own financial analysis of Erin's available investment base and anticipated rate of return, in complete disregard of the evidence at trial, the trial court increased the duration of the alimony payments from six (6) years to an indefinite period of time. Id. Despite making an express finding that Erin had sufficient financial means to pay her own attorneys, the trial court also ordered that Tom reimburse her a total of \$22,500. Id.

²This Court also affirmed the trial court's conclusion that Tom's future employment contract payments were not marital property and reversed the trial court's division of Tom's retirement benefits. Op. at 5-7. Those matters are no longer before this Court.

Tom filed a Motion for Reconsideration/Rehearing of the trial court's Memorandum Decision (dated July 12, 1993) and Supplemental Memorandum (dated November 19, 1993). R.O.A. 731-737, 766-767, 859-883. The Motion was denied, and the trial court entered its final Order on Remand on March 2, 1994. R.O.A. 921-932. Tom then filed a notice of appeal, and Erin filed a notice of cross-appeal. R.O.A. 955, 984.

The issues presented in this appeal are limited to those portions of the Order on Remand: (1) denying reimbursement of past overpayments of alimony; (2) perpetuating the alimony award beyond six years; and (3) awarding attorneys' fees on a finding of no financial need.

STATEMENT OF FACTS

The parties were married on February 12, 1980 and divorced on November 30, 1990. Tr. II: 2, 5; R.O.A. 398-412. During virtually the entire ten-year marriage, Tom pursued a career as a professional basketball player. Tr. II: 24; Tr. IV: 86; Plaintiff's Exh. 2. The parties and their three minor children enjoyed a reasonably comfortable lifestyle during the marriage, and they accumulated substantial assets. Tr. IV: 109-111; Defendant's Exh. 25.

Alimony

In order to maintain a standard of living reasonably similar to that enjoyed during marriage, Erin testified at trial that she would require a net income of approximately \$10,000 per month for herself and for the children who primarily reside with her. Tr. II: 88-89, 91-92, 105-107; see also Plaintiff's Exh. 11. On the

fourth day of trial, the parties entered into a stipulation for division of their real and personal property. Tr. IV: 2-3; R.O.A. 385-386. The trial court fixed Tom's child support obligation at \$4,500 per month (\$1,500 per child), again by stipulation. R.O.A. 383-384, 403. Although recognizing that Erin was receiving substantial income-producing assets, the trial court awarded her \$10,000 per month alimony in addition to the child support, to be reduced to \$5,000 per month after three years, and to terminate after six years. R.O.A. 382-383, 402-403.

Both parties appealed the alimony award. R.O.A. 415, 426. This Court found that the trial court's findings of fact regarding alimony were insufficient. Op. at 3-4. Contrary to the applicable law, the trial court's findings did not address Erin's level of education, health, and other matters concerning her immediate or eventual employability. Id. In addition, the trial court had "double-counted" the children's expenses, including them in both the \$4,500 monthly child support and in the \$10,000 monthly alimony award. Id. at 4. The Court reversed the alimony award and remanded for further findings. Id.

On remand, after considering Erin's employability and treating her living expense need as a separate issue, the trial court found that the alimony award for the first three years should only have been \$7,000 per month, instead of \$10,000 per month. R.O.A. 732, 923-924. However, by the time it corrected its findings, the first three years had already passed, and \$108,000 in overpayments had already been made. Even though this Court had described the situation as "plainly inequitable," Op. at 4 n.1, the trial court

amended its findings without curing the inequity. It ordered that Erin was not required to reimburse the substantial excess sum which she had received. R.O.A. 766-767, 924-925.

The trial court also ordered that the alimony would not terminate after six years, as originally ordered, but would continue until Erin's death or remarriage. R.O.A. 733-734, 926-927. The trial court based its decision primarily on its independent determination that Erin's available investment base was somehow inferior to Tom's available investment base — ostensibly because Erin's property settlement included notes receivable from her own family which the judge deemed "probably uncollectible" and because Tom's professional basketball career had lasted longer than the judge expected. R.O.A. 733-734, 736, 926-927, 929. The trial court also hypothesized that the anticipated rate of return was probably lower than was proven at trial, although no additional economic evidence was introduced on remand. Id.

Attorneys' Fees

Months before trial, the parties stipulated that Tom would advance Erin \$12,500.00 for attorneys' fees, subject to adjustment at the time of the final decree and distribution. R.O.A. 98, 393-394. Erin's trial counsel presented an affidavit reciting that \$58,000.00 had or would be incurred by Erin for legal services. Tr. II: 160-162; Plaintiff's Exh. 17. The trial court found that enough money was being distributed to permit each party to pay his or her own attorneys' fees, but concluded that Tom should still pay an additional \$10,000.00 "in view of the sums of money that Mr.

Chambers is going to be making over the next few years." R.O.A. 393-394, 411.

Both parties appealed the trial court's award of attorneys' fees to Erin. R.O.A. 415, 426. This Court found that the award was an abuse of discretion, because the trial court did not address the reasonableness of the fees and stopped short of finding that each party would have the means to pay their own fees. Op. at 5. The Court reversed the award and remanded the issue for consideration under the standards announced in Bell v. Bell, 810 P.2d 489, 493 (Utah App. 1991). Id.

On remand, the trial court reviewed the record and made a determination that the attorneys' fees requested by Erin were "not unreasonable" and that Tom had the ability to pay Erin's attorneys' fees. R.O.A. 734, 927-928. But, in addition, the trial court made the explicit finding that "[i]t is clear with the distribution of almost a million and a half dollars in assets, that [Erin] could pay her own attorney." R.O.A. 735-736, 921, 930 (emphasis added). Despite this explicit finding, the trial court reaffirmed its award of attorneys' fees, again theorizing that it would be unfair to "erode" Erin's investment base even to this extent, in light of the supposedly uncollectible notes receivable, taxes, and other expenses. Id.

SUMMARY OF ARGUMENT

This Court previously held that it was "plainly inequitable" that the children's expenses (which were the basis for a separate child support award) were also included in Erin's living expense

need, Op. at 4 n.1, and it directed the trial court to reconsider the amount of the alimony award accordingly. On remand, the trial court separately computed Erin's monthly expenses and determined that spousal support should have been set at \$7,000 per month, instead of \$10,000 per month. Although the trial court acknowledged that it had made a mistake, it nevertheless concluded that Erin did not have to reimburse the substantial overpayments which she had already received before the mistake was corrected. The trial court's latest ruling is even more "plainly inequitable" than the last one!

The trial court's conclusion was based on its belief that Erin's investment base had already been decreased by supposedly uncollectible notes receivable from her family included in the stipulated property distribution, and that her investment base would be further undermined if she had to repay the overpayments of alimony. The trial court erred because: (1) the overpayments were Tom's separate property which the trial court had no power to distribute to Erin post-decree; (2) there was no evidence that the notes receivables were uncollectible or that Erin's investment base would be undermined if she reimbursed Tom for the overpayments; and (3) the spirit of this Court's mandate was ignored.

On remand, the trial court also reversed its original order that alimony payments would terminate after six years, and ordered instead that the obligation would continue indefinitely until Erin's death or remarriage. Contrary to the evidence in the record, the trial court postulated that Erin's investment base was somehow less reliable than Tom's and that Erin could expect a four

percent (4%) return, instead of the eight percent (8%) return acknowledged at trial. The trial court erred because: (1) it failed to comply with this Court's mandate for "further explanation" of the original decision; and (2) it based its new decision on evidence outside the record.

Finally, on remand, the trial court reaffirmed its original decision to award Erin partial reimbursement of her attorneys' fees. The trial court predicated its decision on its belief that taxes, the notes receivable, court costs, witness fees, and attorneys' fees must have made "substantial inroads" into Erin's investment base. The trial court erred because: (1) its assumption about the erosion of Erin's investment base was not supported by the evidence; and (2) an award of attorneys' fees is contrary to law when there was an explicit finding that Erin "could pay her own attorney" in light of her receipt of assets valued at \$1.5 million.

LEGAL ARGUMENT

I. The Trial Court's Decision that Erin is Not Required to Reimburse Tom for Overpayments of Alimony is Contrary to the Law, the Facts and the Court of Appeals' Opinion in this Case.

At trial, Erin testified that she would require a net income of approximately \$10,000 per month for herself and the parties' three minor children in order to maintain a standard of living reasonably similar to that enjoyed during marriage. Tr. II: 88-89, 91-92, 105-107; Plaintiff's Exh. 11. By stipulation between the parties, Tom's child support obligation was fixed at \$4,500 per month (\$1,500 per child). R.O.A. 383-384, 403. The trial court awarded Erin alimony of \$10,000 per month for the first three years

in addition to the child support, to be reduced to \$5,000 per month for the next three years, after which alimony would terminate. R.O.A. 382-383, 402.

The trial court's finding with respect to alimony was as follows:

The plaintiff [Mrs. Chambers] presented to the court in her "Exhibit 11," a request and demonstrated need for alimony in the sum of \$10,000.00 per month with an additional \$4,000.00 per month being requested by plaintiff as necessary to pay the income taxes on the \$10,000.00 per month. Plaintiff testified that many of the base expenses were also expenses that would apply to the children as well as herself. Defendant [Mr. Chambers] contends that plaintiff is not entitled to any award of alimony based upon the substantial assets she is receiving. Considering defendant's "Exhibit 25," the court finds that the plaintiff has a need to maintain a standard of living somewhat close to what the parties maintained in the past. The court further determines that the defendant has the ability to pay and plaintiff should be awarded alimony in the sum of \$10,000.00 per month, which should continue for three (3) years. Thereafter, plaintiff should be paid alimony in the sum of \$5,000.00 per month for an additional three (3) years after which alimony will terminate. The reason that the alimony should decline after three (3) years and terminate after six (6) years, is based upon the finding by the court that the plaintiff will earn substantial income from assets that have been awarded to her and which will, by the time three (3) years have passed, be substantially in her possession or under her control and she will be able to invest these assets in such a way as to produce income for her own support.

R.O.A. 382-383. Both parties appealed the alimony award. R.O.A. 415, 426.

This Court held that the trial court's finding was insufficient under the three-prong test announced in Schindler v. Schindler, 776 P.2d 84 (Utah App. 1989). Op. at 3. In particular, the trial court failed to address Erin's level of education, health

and other matters concerning her immediate or eventual employability. Id. In addition, this Court held that:

Additionally, upon remand the district court must reconsider its apparent inclusion of the children's expenses in Mrs. Chambers' alimony award. In its findings, the court acknowledges that many of the expenses listed in Mrs. Chambers' request for \$10,000 per month alimony were expenses that applied to the children. In view of the district court's award of \$4,500 per month in child support, it is plainly inequitable that Mr. Chamber's alimony payment includes the children's expenses.

Op. at 4 n.1 (emphasis added). This Court reversed and remanded the trial court's award of alimony for further findings consistent with the opinion. Id.

On remand, the trial court found that although Plaintiff's Exhibit 11 correctly reflected Erin and the children's needs at about \$10,000 per month, Exhibit 11 failed to include Erin's need for health and accident insurance and money to offset the tax liability on the alimony. R.O.A. 732, 923-924. In recalculating the alimony, the trial court added insurance and taxes to the expenses listed on Plaintiff's Exhibit 11, then deducted the child support, and concluded that Erin "has need of about \$7,000 [per month] to maintain her prior standard of living." Id. This raised the question of how to deal with the overpayments between November 1990 and October, 1993, totalling \$108,000.

Although ~~the~~ trial court conceded both the miscalculation and the overpayments, it nevertheless held that Erin would not have to return Tom's money:

To require the Plaintiff to repay those overpayments would seriously affect her ability to maintain her standard of living. It would undermine further her investment base to a very serious extent. In addition,

in dividing the estate, we had awarded to her an obligation of her family which at this point seems unlikely to be collected. The decision to loan the money to the plaintiff's brother [sic] appears to have been a joint decision. The diminution of her estate by both the loan and repayment of alimony based upon the court's mistake, somehow seems unfair. The Court accordingly declines to order repayment based upon the equities of property division, earning ability, etc.

R.O.A. 766-767; see also R.O.A. 924-925.

There is no legal, factual, or equitable justification for the trial court's refusal to order reimbursement to Tom of the overpayment of alimony. Simply stated, the overpayments (and any interest thereon) are Tom's post-decree separate property. Erin has no legal claim to such property (as this Court made clear in the section of its opinion concerning future earnings), and the trial court has no power to distribute such property to Erin. Jespersion v. Jespersen, 610 P.2d 326, 328 (Utah 1980); see also Woodward v. Woodward, 656 P.2d 431, 432-33 (Utah 1982). The trial court exceeded its jurisdiction when it effectively declared that Erin could keep Tom's money to remedy perceived imbalances in the parties' potential investment income.

The trial court refused to order Erin to repay the overpayments because it believed that: (1) debt payable by Erin's family, awarded Erin in the property distribution, "seems unlikely to be collected" and thereby reduces her investment base; (2) restoring the overpayments to Tom would "undermine further her investment base"; and (3) to diminish "her estate by both the [family receivables] and repayment of alimony based upon the court's mistake, somehow seems unfair." R.O.A. 766-767, 924-925. These

beliefs do not confer legal authority on the trial court to distribute Tom's post-decree earnings to Erin.

Moreover, the trial court's beliefs are absolutely without factual support in the record. The debt the trial court referred to was actually two loans made to Erin's family — a \$100,000 loan to her father and a \$6,000 loan to her sister and brother-in-law. Tr. II: 28-30; Tr. III: 14-15. The parties stipulated at trial that those notes receivable would be awarded to Erin. Tr. IV: 2, 47-48. There is no evidence in the trial record that these debts are uncollectible! See Tr. I: 65, 67; Tr. II: 28-30, 81-82; Tr. III: 14-15, 140-142; Tr. IV: 157-158. In fact, there was evidence before the trial court that Erin's sister and brother-in-law had already begun repaying their loan and that Erin's father intended to repay his loan. Tr. I: 67; Tr. II: 29-30; Tr. IV: 157-158.

The first time that anyone even suggested that the debts were uncollectible appeared in Plaintiff's Remand Response Memorandum, where Erin's current attorney (who did not represent her at trial) off-handedly remarked that "[o]n the loan receivables, \$106,000.00 is an obligation owed from Erin's family which has not been paid and in all probably [sic] will not be. She does not want to sue family members." R.O.A. 685. This comment is not evidence. It was not supported by any citation to the record at trial. Furthermore, even if he did not claim that the debts are uncollectible, but simply that Erin now chooses not to collect them. The redistribution of marital property based on Erin's change of heart was not before the trial court.

The trial court also believed that repayment of the alimony would "seriously affect [Erin's] ability to maintain her standard of living" or "undermine . . . her investment base to a very serious extent." R.O.A. 766-767. This is rank speculation. Simple logic supports the opposite conclusion: Erin's standard of living and investment base were quite obviously increased during the period of time when she received sums in excess of her living expense need. She had \$3,000 per month in excess disposable income, which she either invested or otherwise used to achieve a standard of living higher than she enjoyed during the parties' marriage.

The trial court had already determined that, after the first three years, Erin would be earning "substantial income" from the investment of assets awarded her (i.e., her investment base) so as to justify first a reduction in and eventually a termination of alimony. R.O.A. 382-383. Erin's 1993 investment base should have been \$1,497,578.00, comprised of two installments of Tom's 1989-1990 season income, certain annuities, equalization payments from Tom, checking accounts, loan receivables, tax exempt municipal bonds, and three payments from the Seattle Supersonics. See discussion infra, pp. 19-21. Because of the trial court's error, she received another \$108,000, which the trial court let her keep. Ordering repayment would not have reduced Erin's investment base or lowered her standard of living, because the overpayments should

never have been made available to her to invest or spend in the first place.³

The trial court's refusal to order a refund is, in the words of this Court, "plainly inequitable." Op. at 4 n.1. Over a three-year period, Erin received \$108,000 more than she was entitled to receive. Thanks to this Court, the trial court admitted that its initial alimony analysis was flawed, but it still refuses to correct the mistake. In order to effectuate both the letter and the spirit of its previous mandate, this Court must now specifically direct the trial court to order Erin to refund the overpayments of alimony with interest at the legal rate.

II. The Trial Court Erred in Reversing its Original Decree that Alimony Would Terminate After Six Years.

In the original Decree, the trial court stated that, after the first three years, alimony would be reduced and ultimately eliminated because Erin's own investment income would then be sufficient to meet her living expense need. R.O.A. 382. In the prior appeal, this Court held that the trial court's findings were not specific enough:

[W]ithout further explanation, the court's blanket reference to [Erin's] "substantial income from assets that have been awarded to her" is inadequate to justify the court's reduction of alimony. Without more, we cannot determine whether such reduction constituted an abuse of discretion.

Op. at 3-4. Thus, the Court reversed and remanded the award of alimony "for further findings." Id. at 4.

³ Tom did not insist that the \$108,000 plus interest had to be re-paid immediately in a lump sum. The trial court could have considered the possibility of ordering reimbursement in installment payments.

On remand, taking into consideration Erin's ability to earn income, the return on her investment base, and the child support, the trial court determined that after the first three years alimony should be reduced to \$3,000 per month. R.O.A. 733, 926. However, the trial court also ordered that the alimony would thereafter continue indefinitely! The trial court stated:

The Plaintiff received as her share of the property division \$1,479,578. Realistically it would not be fair to consider that figure as her investment base. There are obviously attorneys' fees and costs of the proceeding as well as taxes to pay, etc. She has also requested that we deduct from her investment base her purchase of a home and the debt by her family. It would not be appropriate to allow the Plaintiff to remove the home from her investment base and also allow her to claim rent expense of over \$1,000 per month.

Figuring a 4% return on her investment base, the imputed income of \$736, and the child support, the alimony award should be reduced at the end of three years to \$3,000 per month.

I had previously ordered termination of alimony at the end of [six] years. That decision was based on the fact that when the Defendant is through with basketball his ability to produce income is frankly no better than Plaintiff's. His present earning ability is based strictly upon his status as a professional athlete. In retrospect that is not entirely correct, for it fails to consider the income he will earn in the meantime. His investment base, considering his interim income, should exceed hers by several times, giving him by far a superior ability to provide on-going assistance.

The alimony then should not terminate except upon the occurrence of remarriage, death, etc.

. . . .

I have referred above to the debt to her family, which is probably not collectable. There was some dispute at trial about whose idea the loan was and to whom it should be assigned. I awarded it to Plaintiff because it was to her family and because I believed that she had some influence in the decision process. There is likewise no question that the Defendant also had some responsibility for that decision. While it is not my

intent to revisit that issue, I think it appropriate to point out that the reduction in her investment base was contributed to by that obligation and that is an equitable factor considered by the court.

R.O.A. 733-734, 736 (emphasis added); see also R.O.A. 926-927, 929.

The trial court exceeded the mandate of this Court by declaring that alimony would continue beyond the six-year rehabilitation period, without any evidentiary basis for reversing itself. In the previous appeal, this Court held that the trial court could not support a reduction in alimony with a blanket statement that Erin would be receiving substantial income from assets awarded to her. Op. at 3. It remanded so that the Court could supplement its order with "further explanation" and detailed findings drawn from the evidence in the record. The record was replete with this kind of evidence, but the trial court chose to ignore it. Instead, it went outside the record and indulged in guesswork about Erin's past, present and future financial condition. This was an abuse of discretion.

It is well settled that the duty of a lower court on remand is to comply with the mandate of the higher court, obeying all directions without deviation. Vinton Eppsco Inc. v. Showe Homes, Inc., 97 N.M. 225, 638 P.2d 1070, 1071 (N.M. 1981). Stated differently, the trial court's jurisdiction on remand is circumscribed by the appellate opinion. Id.; see also In re Adoption of BBC, 849 P.2d 769, 772 (Wyo. 1993); Bryfogle v. Arizona Dept. of Corrections, 153 Ariz. 598, 739 P.2d 819, 821 (App. 1987).

On remand in this case, the trial court should simply have supplemented the previous findings with specific evidentiary

support for the reduction and elimination of alimony, as ordered by this Court in 1992. The record shows that, by stipulation of the parties, Erin was awarded the following cash or cash equivalent assets:

Last two installments of Tom's 1989-1990 season income	\$ 80,000.00
Certain Annuities	\$420,000.00
Equalization Payments from Tom	\$377,892.00
Checking Accounts and Loan Receivables	\$107,802.00
Tax Exempt Municipal Bonds	\$ 26,384.00
Seattle Supersonics February 1991 Payment	\$150,000.00
Seattle Supersonics February 1992 Payment	\$152,500.00
Seattle Supersonics February 1993 Payment	<u>\$165,000.00</u>
TOTAL:	<u>\$1,497,578.00</u>

Tr. IV 2-3, 35-49; R.O.A. 385-393, 405-410.

At trial, Dennis Abold, a Certified Public Accountant, calculated what the after-tax cash flow would be from the investment of the assets awarded to Erin, based on a reasonable interest rate of eight percent (8%) per annum and a net tax effect of thirty-five percent (35%). Tr. III: 93-96.⁴ Mr. Abold testified that the net income to Erin from the assets would range from \$2,807.00 per month in 1990, all the way up to \$4,724.00 per month in 1993 and beyond. Id. He further testified that when the monthly child support of \$4,500.00 is added in, the total after-tax

⁴Mr. Abold based his calculations on a proposed property division which closely approximated the amount of cash and cash equivalent assets actually awarded to Erin. See Tr. III: 89-96; R.O.A. 405-410.

income to Erin, including investment income, would range from approximately \$7,307.00 per month in 1990 to approximately \$9,224.00 per month in 1993 and beyond. Id. Erin submitted absolutely no evidence to contradict Mr. Abold's testimony.

At the end of trial, the trial court concluded that the alimony should decline after three years and terminate after six years, based upon the court's finding that Erin "will earn substantial income from assets that have been awarded to her and which will by the time three (3) years have passed, be substantially in her possession or under her control and she will be able to invest these assets in such a way as to produce income for her own support." R.O.A. 382. Clearly, Mr. Abold's testimony supported the order that alimony be gradually reduced and then eliminated. By saying so, the trial court would have complied with this Court's mandate. By not saying so, the trial court deviated from the directions on remand.

Furthermore, the trial court's new findings on remand are not based on the evidence at trial or any subsequent evidentiary hearing. At the hearing on remand, the trial court specifically determined that an evidentiary hearing on the alimony and attorneys' fees issues was not necessary, stating: "the Court has heard the evidence and the record is available to me." Hr. (6/7/93) 54-55, 57-58. Therefore, the trial court should have limited its research to a consultation of the trial transcripts and exhibits. The trial court did not do so. Instead, it seized upon unsubstantiated and unproven assumptions outside the record.

Most notably, the trial court speculated that Erin's potential income should be calculated by "[f]iguring a 4% return on [Erin's] investment base." R.O.A. 926-927. Where is the evidence to support that assumption? Certainly not in the testimony and documents introduced into evidence at trial. Apparently, the trial court accepted at face value the arguments of Erin's attorney on remand that a rate between three and one-half percent (3.5%) and four and one-half percent (4.5%) was more realistic than the eight percent (8%) which was uncontroverted at trial.⁵ R.O.A. 685-686. Where the admissible evidence is not in conflict, it is reversible error for the trial court to make contrary findings. See English v. English, 565 P.2d 409, 410 (Utah 1977).

The portion of the Order on Remand extending the alimony indefinitely was also based, in part, on the trial court's erroneous belief that Erin's investment base had been eroded by attorneys' fees and costs, taxes, and the "uncollectible" family loans discussed above. As also discussed above, the trial court's belief that the family loans were "uncollectible" is neither supported by logic nor by the evidence. See discussion supra pp. 14-17. With respect to taxes, the evidence presented at trial already took into consideration the tax effect on Erin's investment base. Tr. III: 93-96. The trial court also allowed Erin an offset for the tax liability on the alimony payments when it re-calculated

⁵In fact, Erin's own expert at trial, Merrill R. Norman, a CPA and financial analyst, testified that he assumed an interest rate of eight percent (8%) on an investment of the annuities. Tr. I: 100-101.

Erin's alimony award on remand. R.O.A. 732, 923-924. The subject of attorneys' fees and costs is dealt with infra at Section III.

Finally, the trial court based its decision that the alimony should not terminate upon its finding that Tom had the "ability to provide on-going assistance." R.O.A. 926-927. In its Order on Remand, the trial court states that it previously ordered termination of the alimony based on the fact that, when Tom is through with basketball, his ability to produce income will be no better than Erin's. Id. The trial court further states that it forgot to take into consideration Tom's interim income and larger investment base, and concludes that Erin should receive on-going alimony because Tom will be able to afford it. Id. The trial court's reasoning and recollection of the record in this regard are both unsound.

In point of fact, in its original Findings of Fact, the trial court stated that "[t]he reason that the alimony should decline after three (3) years and terminate after six (6) years, is based upon the finding by the court that [Erin] will earn substantial income from assets that have been awarded to her." R.O.A. 383. Thus, the trial court previously ordered termination of the alimony because the evidence showed Erin would not need alimony after six years, not because of Tom's ability (or inability) to continue to generate future earnings. The courts have consistently reversed alimony awards that appeared to be designed to equalize disparity in the parties' respective post-decree income levels rather than merely providing supplementary income necessary to meet the recipient's living expense need. Burt v. Burt, 799 P.2d 1166, 1170

n.3 (Utah App. 1990); Gardner v. Gardner, 748 P.2d 1076, 1083 (Utah 1988) (J. Howe, concurring and dissenting).

For these reasons, the trial court erred in failing to specify the evidentiary basis for its determination that alimony would terminate after six years and compounded that error by hypothesizing reasons for extending spousal support payments indefinitely.

III. The Trial Court's Award of Attorneys' Fees to Erin Despite its Finding of No Need Was Error.

Before trial, the parties stipulated that Tom would make an advance payment to Erin of \$12,500.00 for attorneys' fees, subject to adjustment at the time of the final decree and distribution. R.O.A. 98, 393-394. At trial, Erin's counsel presented an affidavit reciting that \$58,000.00 had or would be incurred by Erin for legal services. Tr. II: 160-162; Plaintiff's Exh. 17. Even though the trial court found that "there is probably adequate money being distributed to both parties to pay their own attorneys' fees," it decided that Tom should pay Erin an additional \$10,000.00 for attorneys' fees, "in view of the sums of money that Mr. Chambers is going to be making over the next few years." R.O.A. 393-394, 411. Both parties appealed the trial court's award of a partial reimbursement of attorneys' fees to Erin. R.O.A. 415, 426.

This Court held that the award of attorneys' fees was an abuse of discretion, because the trial court did not address the reasonableness of the fees and stopped short of finding that each party would have the means to pay their own counsel. Op. at 5. It reversed the award and remanded the issue for express consideration

of the three elements outlined in Bell v. Bell, 810 P.2d 489, 493 (Utah App. 1991). Id.

In considering the first two elements on remand, the trial court found that the amount of the attorneys' fees requested by Erin was "not unreasonable" and that Tom had the ability to assist Erin in paying attorneys' fees. R.O.A. 734, 927-928. The trial court further stated:

The final prong of the "Bell" (810 P2d 489) analysis relates to the ability of the Plaintiff to pay her own attorneys' fees. It is clear with the distribution of almost a million and a half dollars in assets, that the Plaintiff could pay her own attorney. However the court was concerned about the necessity of her being able to maintain an appropriate investment base. I was aware that there would be substantial inroads into that base by reason of taxes, the debt owed by her family (which is likely uncollectible), court costs, witness' fees, attorneys' fees, etc. In the interest of her being able to maintain a base sufficient to provide an appropriate income, I felt she needed some assistance with the fees. I ruled the attorneys' fees previously paid have been paid with marital assets not to be considered in the final distribution, and awarded her an additional \$10,000 to apply to her attorneys' fees. Based upon the above considerations I find that the Plaintiff has need of assistance with her attorneys' fees.

R.O.A. 735-736 (emphasis added); see also R.O.A. 928, 930.

The trial court thus concluded on remand that Erin needed assistance with her attorneys' fees only because it believed taxes, family loans and legal expenses had made "substantial inroads" into her investment base. As established in the preceding sections of this brief, there is no evidence that the family loans were uncollectible, there is no evidence to establish the legal expenses actually paid by Erin (even making the assumption that this would be a relevant factor) and there is uncontroverted evidence that taxes were already taken into consideration by the expert who

calculated Erin's investment income. Thus, the trial court erred in its conclusion that Erin's investment base was eroded.

There is no finding by the trial court that the attorneys' fees she incurred would prevent her from maintaining an appropriate level of investment income. To the contrary, on remand, the trial court stated: "[I]t is clear with the distribution of almost a million and a half dollars in assets, that Plaintiff could pay her own attorney." R.O.A. 735, 928 (emphasis added). There can be no award of attorneys' fees without a showing of financial need. Kerr v. Kerr, 610 P.2d 1380, 1384 (Utah 1980); Kallas v. Kallas, 614 P.2d 641, 646 (Utah 1980). Therefore, the award of attorneys' fees to Erin must be reversed, and the trial court should be specifically directed to order Erin to reimburse the previous payments with interest.

CONCLUSION

For the reasons expressed above, Tom requests that the Order on Remand be reversed in part, with the following instructions on remand: (1) that the trial court be directed to order Erin to reimburse Tom for overpayments of alimony in the amount of \$108,000 plus interest; (2) that the trial court be directed to reinstate its original order terminating alimony payments after six years; and (3) that the trial court be directed to reverse its award of attorneys' fees to Erin and order Erin to reimburse Tom for previous payments in the amount of \$22,500 plus interest. In all other respects, the Order on Remand and the Decree should be affirmed.

RESPECTFULLY SUBMITTED this 3 day of August, 1994.

VLAHOS, SHARP & BRADLEY

By 

Pete N. Vlahos
Legal Forum Building
2447 Kiesel Avenue
Ogden, UT 84401
(801) 621-2464
Attorneys for Defendant/
Appellant/Cross-Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of August, 1994, I mailed four (4) true and correct copies of the foregoing BRIEF OF APPELLANT to the attorney for Plaintiff/Appellee/Cross-Appellant, by placing same in the United States Mail, postage prepaid and addressed to the following:

Brian R. Florence
FLORENCE AND HUTCHISON
818 - 26th Street
Ogden, UT 84401


Pete N. Vlahos

APPENDIX 1

Brian R. Florence #1091
of FLORENCE AND HUTCHISON
Attorney for Plaintiff
818-26th Street
Ogden, UT 84401
399-9291 - / FAX 399-9333

MAR 1 2 11 AM '94

IN THE DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

ERIN JO CHAMBERS,	:	
	:	FINDINGS OF FACT,
Plaintiff,	:	CONCLUSIONS OF LAW
	:	<u>AND ORDER ON REMAND</u>
vs.	:	
	:	
THOMAS D. CHAMBERS,	:	Civil No. 890901927
	:	Hon. Stanton M. Taylor
Defendant.	:	

MAR 2 1994

BACKGROUND

On October 21, 1992, the Utah Court of Appeals filed its decision on the earlier appeal of this case. See Chambers v. Chambers, 198 U.A.R. 49 (Utah App. 1992).

After remand, the matter was placed on the Court's calendar for a scheduling conference for January 19, 1993. The parties, through their respective counsel, appeared before the Court on that day, at which time the defendant, through his counsel, filed with the Court a Memorandum on Remand and proposed Supplemental Findings of Fact, Conclusions of Law and amended Decree of Divorce Nunc Pro Tunc. Defendant's Memorandum contended that sufficient evidence existed in the record to support supplemental Findings, Conclusions and Amended Decree of Divorce and that no further hearing should be necessary.

The Court gave plaintiff additional time to respond to

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defendant's Memorandum and provisionally scheduled the matter for trial on June 24, 1993.

On February 17, 1993, the plaintiff, through her counsel, filed a Response to Memorandum and thereafter the Court scheduled a hearing for argument which was held June 7, 1993. The parties, through their respective counsel, presented their positions. At the conclusion of the hearing, the Court announced that it felt sufficient facts existed in the record to permit the Court to supplement its findings in conformance with the directions of the Court of Appeals, canceled the trial date and took the matter under advisement.

On July 9, 1993, the Court issued its Memorandum Decision.

On July 13, 1993, the plaintiff, through her counsel, asked the Court for some further clarification with respect to its decision, which clarification was provided by letter from the Court dated July 16, 1993.

On September 15, 1993, the parties' counsel met with the Court requesting additional clarification regarding the effective date of the reduction of alimony. The Court took that matter under further advisement and issued its Supplemental Memorandum on November 19, 1993.

With this background, the Court now enters the following:

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FINDINGS OF FACT

1. The Court of Appeals reversed and remanded this case to this Court outlining three areas for the Court's reconsideration. Those three areas were alimony, division of retirement and an award of attorney fees.

2. In this case, there is no question that in considering the preferences established in Woodward v. Woodward, 656 P.2d 431 (Utah 1982), the facts would favor a present division of the retirement because the present value is determinable and there are sufficient assets in the estate to allow such a division. The Court has personally felt that there should be a strong preference favoring a division which would assure a non-working spouse with a secure independent retirement income, but the Court defers to the wisdom and law established by Woodward.

3. In reconsidering the alimony award in the original Decree, it occurs that there were miscalculations.

4. Plaintiff's Exhibit 11 correctly reflected the needs of the plaintiff and her children at about \$10,000.00 per month. That amount failed to consider her additional need of health and accident insurance (previously provided by the defendant) and money to offset her tax liability for her receipt of alimony.

5. The Court recognized there were substantial

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children's expenses involved in the Exhibit 11 needs assessment, but those expenses would be approximately offset by the fact that the child support nearly equalled the amount of children's expense alleged on Exhibit 11 and the \$4,500.00 child support was included in the income calculations.

6. In recalculating the alimony, if the Court accepts the expenses of Exhibit 11 and adds the expenses of health and accident insurance and taxes on the alimony paid and then deducts the child support, that means the plaintiff has need of about \$7,000.00 to maintain her prior standard of living.

7. The estimated \$7,000.00 for the plaintiff to maintain her prior standard of living does not factor into any consideration of the plaintiff's ability to provide for herself or money received as returns on investments from assets awarded to her as part of the property division.

8. It was the intent of the Court that the plaintiff should have the initial three years as a rehabilitative period to:

- A. Marital her assets;
 - B. Learn to invest appropriately;
 - C. Make decisions about her future;
 - D. Prepare for future employment;
 - E. Become settled, etc.
9. In the Court's reconsideration of alimony in the

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Memorandum Decision issued July 9, 1993, the Court failed to specify the disposition of the over-payment of alimony from the time of the original Decree to the Order of the Court of Appeals. Upon reflection, that failure may have been a result of a subconscious desire to not address the issues in hopes it would go away. To require the plaintiff to repay those over-payments would seriously affect her ability to maintain her standard of living. It would undermine further her investment base to a very serious extent. In addition, in dividing the estate, we had awarded to her an obligation of her family which at this point seems unlikely to be collected. The decision to loan the money to plaintiff's brother appears to have been a joint decision. The diminution of her estate by both the loan and repayment of alimony based on the Court's mistake, somehow seems unfair.

10. Plaintiff was thirty years of age at the time of trial. She testified that she had two and one-half years of college and that she held certain jobs previously, including teaching dancing, working in window display and as a clerk at ZCMI and a clerk at Stop & Shop. She also testified she helped manage some apartments. Plaintiff also testified that she had not made any attempts to obtain any employment outside of the house. The evidence also showed that plaintiff participated in many types of physical activities

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and there were no reasons, health or otherwise, why plaintiff could not be fully employed and contribute to her own needs. Plaintiff could have found appropriate employment which would provide at least a minimum wage income of \$736.00 to assist in providing her own needs.

11. The plaintiff received as her share of the property division \$1,479,578.00. Realistically, it would not be fair to consider that figure as her investment base. There were obviously attorney fees and costs of the proceeding, as well as taxes to pay, etc. The plaintiff has requested that we deduct from her investment base her purchase of a home and the debt to her from her family.

12. It would not be appropriate to allow the plaintiff to remove the home from her investment base and also allow her to claim rent expense of over \$1,000.00 per month.

13. The Court figures with a four percent return on her investment base, the imputed income of \$736.00 and the child support, the alimony should be reduced at the end of three years to \$3,000.00 per month.

14. The Court previously ordered the alimony to be terminated at the end of six years. That decision was based on the fact that when the defendant was through with basketball, his ability to produce income is frankly no better than the plaintiffs and his present earning ability is

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based strictly upon his status as a professional athlete.

15. In retrospect, that is not entirely correct or it fails to consider the income he will earn in the meantime. His investment base, considering his interim income, should exceed the plaintiff's by several times, giving him by far a superior ability to provide on-going assistance.

16. The final issue requiring consideration is that of the attorney fee award. The stipulation at trial, as the Court understood it, was that if Mr. Dolowitz were called to testify, he would verify the material contained in plaintiff's Exhibit 17 and express the opinion that the time and costs involved were reasonable taking into account the complexity and seriousness of the issues involved. The defendant did not stipulate the charges or time were reasonable, but only that Mr. Dolowitz would testify accordingly.

17. Plaintiff's Exhibit 17 contained a summary sheet of the gross charges, a breakdown of the hourly rate of persons from Mr. Dolowitz's office working on the plaintiff's case, a monthly summary of charges, times and persons and finally a day-by-day account of date, attorney, service description, hours and charge.

18. In considering the complexity of issues, the number of hearings, the conferences, the resolution of

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issues, the animosity between the parties, the amounts of money and property, the Court believes the attorney fee charges were not unreasonable.

19. An additional issue relating to attorney fees is the fact that the defendant with a multi-million dollar income clearly has the ability to assist the plaintiff with her attorney fees and in comparison of the resources of the two parties, he is in a much superior position.

20. The final prong of the test established in Bell v. Bell, 810 P.2d 489 (Utah App. 1991) relates to the ability of the plaintiff to pay her own attorney fees. It is clear with the distribution of almost a million and one-half dollars in assets, the plaintiff could pay her own attorney. However, the Court was concerned about the necessity of her being able to maintain an appropriate investment base. The Court was aware that there would be substantial inroad into that base by reason of taxes, the debt owed by her family which is likely uncollectible, court costs, witness fees, attorney fees, etc.

21. In the interest of the plaintiff being able to maintain a base sufficient to provide an appropriate income, she has need of some assistance with her attorney fees.

CONCLUSIONS OF LAW AND ORDER

1. The defendant is awarded all of his NBA or

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basketball related retirements subject to paying the plaintiff one-half of the value in existence at the time of the original divorce trial. The value of the NBA Players Pension Plan presented at the time of trial was \$64,758.92, one-half of which would belong to the plaintiff (\$32,379.46).

2. In addition, in the past there have been enhancements to the plan having retroactive effect. If enhancements have occurred since the time of the trial of this matter, plaintiff shall be entitled to her share of any such enhancements based on the Woodward formula. This shall apply to any retirements existing at the time of the trial of this matter.

3. A minimum wage income of \$736.00 per month should be imputed to the plaintiff.

4. Based on the findings concerning the plaintiff's return on her investment base, her imputed income as stated above and the child support previously stipulated to and ordered, plaintiff's alimony should be reduced to \$7,000.00 per month effective with the Court's Memorandum Decision dated July 12, 1993, which shall continue for the balance of the three-year rehabilitative period, after which the alimony should be reduced to \$3,000.00 per month.

5. The alimony awarded herein should only terminate upon the occurrence of remarriage, death or operation of law.

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6. Based on the findings above and the standards established in Bell v. Bell, 810 P.2d 489 (Utah App. 1991), the \$10,000.00 attorney fee award made at the time of trial is hereby affirmed.

ORDER

The Court having issued its Findings of Fact and Conclusions of Law, hereby enters the following order:

IT IS HEREBY ORDERED that defendant be and he is hereby awarded all of his NBA or basketball related retirements subject to paying the plaintiff one-half of the value in existence at the time of the original divorce trial. The value of the NBA Players Pension Plan presented at the time of trial was \$64,758.92, one-half of which would belong to the plaintiff (\$32,379.46).

IT IS FURTHER ORDERED that in addition, in the past there have been enhancements to the plan having retroactive effect. If enhancements have occurred since the time of the trial of this matter, plaintiff shall be entitled to her share of any such enhancements based on the Woodward formula. This shall apply to any retirements existing at the time of the trial of this matter.

IT IS FURTHER ORDERED that a minimum wage income of \$736.00 per month shall be imputed to the plaintiff.

IT IS FURTHER ORDERED that based on the findings

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concerning the plaintiff's return on her investment base, her imputed income as stated above and the child support previously stipulated to and ordered, plaintiff's alimony shall be reduced to \$7,000.00 per month effective with the Court's Memorandum Decision dated July 12, 1993, which shall continue for the balance of the three-year rehabilitative period, after which the alimony shall be reduced to \$3,000.00 per month.

IT IS FURTHER ORDERED that the alimony awarded herein shall only terminate upon the occurrence of remarriage, death or operation of law.

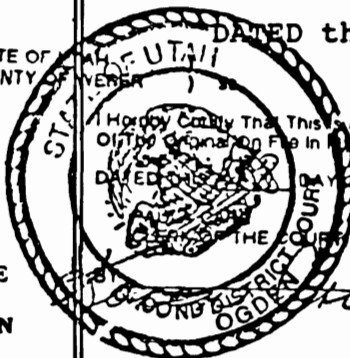
IT IS FURTHER ORDERED that based on the findings above and the standards established in Bell v. Bell, 810 P.2d 489 (Utah App. 1991), the \$10,000.00 attorney fee award made at the time of trial is hereby affirmed.

DATED this 7 day of March, 1994.

BY THE COURT:

STANTON M. TAYLOR, Judge

STATE OF UTAH
COUNTY OF KANE



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NOTICE TO PLAINTIFF

TO DEFENDANT ABOVE-NAMED AND HIS COUNSEL:

Pursuant to Rule 4-504 of the Code of Judicial Administration, you are hereby notified that the undersigned

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will hold the original hereof for a period of five days from the date this notice is mailed to you to allow you sufficient time to file any written objections to the form of the foregoing with the Court and mail a copy to the undersigned. If no objections to the form are filed within that time, the original hereof will be submitted to the Court for signature and filing.

DATED this 25th day of January, 1994.

FLORENCE AND HUTCHISON

BRIAN R. FLORENCE
Attorney for Plaintiff
818-26th Street
Ogden, UT 84401

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Order on Remand, postage prepaid, to the following at the addresses listed on this 25th day of January, 1994.

FLORENCE
AND
HUTCHISON

Pete N. Vlahos
Attorney for Defendant
2447 Kiesel Avenue
Ogden, UT 84401

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